IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 18, 2007 Session

LISA DAWN GREEN and husband RONALD KEITH GREEN, minor children, Dustin Dillard Green, Hunter Green, and Kyra Green, v. VICKI RENEE JOHNSON, TABITHA CONNOR, CARROLL BLANKENSHIP, CHAD MATTHEW CORCORAN, Individually and d/b/a THE PUB, and STUART JASON MYERS

Direct Appeal from the Circuit Court for Knox County
No. 2-601-02 Hon. Harold Wimberly, Circuit Judge

No. E2006-02666-COA-R3-CV - FILED JULY 25, 2007

Plaintiff, as a pedestrian, was struck by a motor vehicle operated by an uninsured driver and owner. She obtained a Judgment against the uninsured driver and owner for damages and entered into a settlement with a dram shop owner for the injuries sustained in an amount in excess of $50,000.00. Her automobile liability insurance carrier afforded her with $50,000.00 of uninsured motorist coverage and filed a Motion for Summary Judgment which the Trial Court sustained on the basis of Tenn. Code Ann. § 56-7-1205 which permits the insurer to offset its liability to the insured by whatever amount of money the insured may receive from whatever source as damages. On appeal, we affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

C. Edward Daniel, and Annie S. Duncan, Knoxville, Tennessee, for appellant.

Dallas T. Reynolds, Knoxville, Tennessee, for appellee.

OPINION

Plaintiff brought an action seeking compensation for injuries received when she was struck by an automobile on Cumberland Avenue. She alleged the car was operated by Vicki

Johnson, and that it was owned by Carroll Blankenship and Tabatha Conner. Further, that the automobile ran a red light and struck her, as a pedestrian. She alleged that Johnson and Connor had been drinking in an establishment known as The Pub and had been allowed to become extremely intoxicated. She concluded that The Pub, its owners and employees, Johnson, Connor, and Blankenship were all liable for her injuries.

An Order of Default Judgment was entered against Johnson and Connor, and a hearing was held to determine damages and allocate fault. The Court awarded $3,650,000 in compensatory damages, and $1,000,000 in punitive damages, and assessed fault at 65% to Johnson and Conner and 35% to The Pub and its owners/employees. The Court noted that The Pub and its owners had entered into a settlement with Green, and the issues as to uninsured motorist claims were reserved.

State Farm Insurance then filed a Motion for Summary Judgment, and attached Green's Response to Requests to Admit, which stated that she had received a settlement from The Pub that was equal to or greater than $50,000.00. State Farm also filed its Response to Green's Requests for Admissions, and admitted that Johnson and Conner did not have automobile insurance in effect at the time of the accident.

State Farm attached its Answer, which stated that Green had an automobile insurance policy with State Farm that was in effect at the time of the accident, which vehicle was not involved in the accident, and that the limits of liability on the policy were $50,000.00 for uninsured motorist coverage. It concluded that it was entitled to the contractual rights of subrogation and to all credits and offsets as provided by its policy and Tenn. Code Ann. §56-7-1201 *et seq*.

State Farm attached its policy with the insured, which states that any amount payable under the uninsured motorist coverage "shall be reduced by any amount paid or payable to or for the insured", "by or for any person or organization who is or may be held legally liable for the bodily injury or property damage sustained by the insured". State Farm posited that since plaintiff had received at least $50,000.00 from The Pub, it had no remaining liability, as its policy limits were $50,000.00, and that Tenn. Code Ann. §56-7-1201 (a section of the uninsured motorist statute) allowed it to reduce its coverage by amounts collected by the plaintiff from other sources.

Plaintiff, in response, asserted that State Farm had no subrogation or set off rights in this case, because plaintiff did not collect under another policy of automobile insurance.

The Trial Court granted State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment, and plaintiff has appealed.

The sole issue on appeal is whether the uninsured motorist carrier is entitled to a credit from settlement proceeds made to the plaintiff by a non-motorist defendant who settled with the plaintiff for its portion of fault under the Dram Shop statutes?

Plaintiff argues that State Farm's policy provision is in conflict with the Tennessee uninsured motorist statutes, and is not controlling. State Farm argues that since its policy provision states that coverage "shall be reduced by any amount paid or payable to or for the insured", "by or for any person or organization who is or may be held legally liable for the bodily injury or property damage sustained by the insured" it is entitled to the reduction claimed.

"[A]ny statute applicable to an insurance policy becomes part of the policy and such statutory provisions override and supersede anything in the policy repugnant to the provisions of the statute." *Hermitage Health & Life Ins. Co. v. Cagle*, 420 S.W.2d 591, 594 (Tenn. Ct. App. 1967). Accordingly, all provisions of the Tennessee Uninsured Motorist statutes "become provisions of all automobile insurance policies issued for delivery in Tennessee", and where there is a conflict, the "statutory provision must prevail." *Fleming v. Yi*, 982 S.W.2d 868 (Tenn. Ct. App. 1998), *citing Dunn v. Hackett*, 833 S.W.2d 78 (Tenn. Ct. App. 1992).

Tenn. Code Ann. §56-7-1201(d) provides that the limit of liability for an insurer providing Uninsured Motorist coverage is "the amount of that coverage as specified in the policy less the sum of the limits collectible under all liability and/or primary uninsured motorist insurance policies, bonds, and securities applicable to the bodily injury" of the insured. Plaintiff argues that the provision in State Farm's policy allowing coverage to be reduced "by any amount paid" is inconsistent with the Uninsured Motorist statute (and with its own policy's stated purpose of compensating the insured for bodily injury from an uninsured motorist). Further, that the Uninsured Motorist statutes are designed to protect citizens from injuries by uninsured motorists, and that to allow plaintiff's recovery to be reduced by the amount she received from The Pub, which was not an uninsured motorist, would be contrary to the purpose of the statute.

Plaintiff relies on *Sherer v. Linginfelter*, 29 S.W.3d 451 (Tenn. 2000), as authority for her position. This reliance is misplaced. The Supreme Court held that Tenn. Code Ann. §56-7-1204(a) did not allow the Uninsured Motorist carrier subrogation rights against plaintiff's recovery from General Motors, because General Motors was paying for "enhanced or additional injuries" to plaintiff caused by the seatbelt system, and not for any injury caused by operation of the vehicle. The Court noted that it was not expressing any opinion on the construction of Tenn. Code Ann. §56-7-1205, as it was not an issue in that case. *Id.*

Tenn. Code Ann. §56-7-1205 provides:

> Nothing contained in this part shall be construed as requiring the forms of coverage provided pursuant to this part, whether alone or in combination with similar coverage afforded under other automobile liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits described in § 55-12-107, or the uninsured motorist liability limits of the insured's policy if such limits are higher than the limits described in § 55-12-107. Such forms of coverage may include such terms, exclusions, limitations, conditions,

and offsets, which are designed to avoid duplication of insurance and other benefits.

This section has previously been construed as allowing policy provisions which limit the recovery of the insured to the Uninsured Motorist policy limits, "from all insurance or other benefits available to him". *State Auto. Mutual Ins. Co. v. Cummings*, 519 S.W.2d 773 (Tenn. 1975). As discussed in *Thompson v. Parker*, 606 S.W.2d 538, 540 (Tenn. Ct. App. 1980):

> We understand *Cummings* to mean that the uninsured motorist insurance statutes of this state provide less than broad coverage since the legislature had permitted uninsured motorist policies to be written so as to "include such terms, exclusions, limitations, conditions, and offsets, which are designed to avoid duplication of insurance and other benefits." (T.C.A. s 56-7-1205). We further understand *Cummings* to mean that the legal liability of more than one tortfeasor or the involvement of multiple vehicles in one tortious event or accident is immaterial as to the interpretation of exclusions, permitted by T.C.A. s 56-7-1205, which allow an insuror by contract to reduce its liability by any sums paid to its insured by other parties jointly or severally liable to the insured.
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> In addition we observe uninsured motorist insurance does not actually insure the uninsured motorist. It insures the insured and assures him of some recovery when the other parties do not have liability insurance. The statute, T.C.A. s 56-7-1205, permits the insuror, by contract, to offset its liability to the insured by whatever amount of money from whatever source the insured may receive it, if the money from the outside source would be a duplication of the amount agreed to be paid by the insuror.

In *Poper v. Rollins*, 90 S.W.3d 682 (Tenn. 2002), the Supreme Court explained that some jurisdictions were "broad coverage" jurisdictions, such that no offsets would be allowed to limit the insured's full recovery, and others (including Tennessee) were "limited coverage" jurisdictions, such that "all sums collected can be credited towards reaching the statutory minimum." *Id*. at 686. In that case in the Supreme Court the plaintiff argued that his Uninsured Motorist carrier should be held liable for the unpaid liability of the remaining defendant who was under insured. Plaintiff argued that pursuant to comparative fault principles, each tortfeasor was responsible for his own percentage of fault, and the amounts paid by other defendants should not be used to offset the liability of the remaining underinsured defendant. *Id.* The Supreme Court held that Tenn. Code Ann. §56-7-1201(d) "unambiguously allows an uninsured motorist insurance carrier to limit its liability by offsetting 'all liability and/or primary uninsured motorist insurance policies, bonds, and securities applicable to the bodily injury or death of the insured'." *Poper*, at 685. The Court found that since the plaintiff had received a total settlement of $530,000.00, and that amount exceeded the $100,000.00 coverage limit of plaintiff's Uninsured Motorist policy, then the Uninsured Motorist

carrier would have no liability "under the clear language of Tenn. Code Ann. §56-7-1201(d)."[1]

The Court considered plaintiff's argument that this interpretation of the statute conflicted with comparative fault principles, and his reliance on the *Sherer* case. The Court responded, "We find Poper's reference to *Sherer* unpersuasive because Tenn. Code Ann. § 56-7-1204(a) only applies 'in the event of payment to any person under the coverage required by this part . . . .' Tenn. Code Ann. § 56-7-1204(a). In this case before us, the uninsured motorist carrier, Farmers, never made a payment and was not required to do so for reasons discussed in this opinion. As such, Tenn. Code Ann. § 56-7-1204(a) and the analysis in *Sherer* are inapplicable." *Poper*, at 685, f.n.3. The Court went on to hold that principles of comparative fault and the elimination of joint and several liability did not "modify the specific language of or alter the meaning of Tenn. Code Ann. §56-7-1201(d)". *Id*. at 686. The Court noted that as a "limited coverage" jurisdiction, the Tennessee Uninsured Motorist statute only allowed a plaintiff to collect damages up to the statutory minimum, notwithstanding the plaintiff's actual damages. *Id*. Thus the Court held that Tenn. Code Ann. §56-7-1201(d) allowed an uninsured motorist insurance carrier to limit its liability by offsetting all other payments, and affirmed the grant of summary judgment to the Uninsured Motorist carrier. *Id*., *accord: Erwin v. Rose*, 980 S.W.2d 203 (Tenn. Ct. App. 1998).

In this case, plaintiff's Uninsured Motorist coverage had a limit of $50,000.00, and plaintiff has already collected in excess of that amount from her settlement with The Pub. Thus, as in *Poper* and *Erwin,* State Farm can reduce its liability by offsetting this payment, such that it has no liability.

Since plaintiff has received a settlement from one defendant which meets or exceeds the policy limits of her Uninsured Motorist coverage, and based upon the statute as interpreted by case law and the policy language, the settlement amount can be used to offset State Farm's liability. Accordingly, we affirm the Judgment of the Trial Court.

The cost of the appeal is assessed to the plaintiff, Lisa Dawn Green.

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HERSCHEL PICKENS FRANKS, P.J.

[1] The Court noted that the legislature had amended the Uninsured Motorist statute in 1999 to provide that the Uninsured Motorist carrier "shall be entitled to credit for the total amount of damages collected by the insured from all parties alleged to be liable for the bodily injury or death of the insured whether obtained by settlement or judgment and whether characterized as compensatory or punitive damages", and that while this amendment made the legislative intent even more clear, the statute was still clear and unambiguous even without the amendment. Poper, at 685, f.n.2; Tenn. Code Ann. §56-7-1206(I).